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No. 73-1346

In the Supreme Court of the United States

OCTOBER TERM, 1974

JOHN L. McLUCAS, SECRETARY OF THE AIR FORCE, ET AL., APPELLANTS

v.

RAYMOND G. DeCHAMPLAIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of this district court (J.S. App. 15-28) is reported at 367 F. Supp. 1291.

JURISDICTION

The preliminary injunction of the district court (J.S. App. 29–30) was entered November 13, 1973. A notice of appeal to this Court (J.S. App. 31) was filed on December 12, 1973. On February 12, 1974, the Chief Justice extended the time for docketing the appeal to March 4, 1974, and on that date the jurisdictional statement was filed. On June 24, 1974, this Court postponed further consideration of the question

of jurisdiction to the hearing of the case on the merits (App. 78). The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under 28 U.S.C. 1252 to review an order of a single-judge district court preliminarily enjoining a serviceman's pending court-martial under Article 134 of the Uniform Code of Military Justice ("U.C.M.J."), 10 U.S.C. 934, on the ground that this statute is unconstitutionally vague.

2. Whether a district court may enjoin the pending court-martial of a serviceman.

3. Whether the third clause of Article 134 of the U.C.M.J., 10 U.S.C. 934, which confers court-martial jurisdiction over "crimes and offenses not capital," is unconstitutionally vague.

4. Whether the district court properly invalidated restrictions on access to and use of classified documents by the accused serviceman's civilian counsel.

STATUTES INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

28 U.S.C. 1331(a) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 U.S.C. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

STATEMENT

Appellee Air Force Master Sergeant Raymond G. DeChamplain brought this action in the district court to enjoin the Secretary of the Air Force and five Air Force officers from retrying him by general court-martial pursuant to the order of the Air Force Court of Military Review (see App. 6–18). DeChamplain is charged with: (1) conspiring to communicate classified information to an agent of a foreign government, in violation of Articles 81 and 134 of the Uniform Code of Military Justice and 50 U.S.C. 783(b); (2) failing to obey an Air Force regulation requiring the reporting of contacts with foreign agents, in violation of Article 92, U.C.M.J., and (3) violating Article 134, U.C.M.J., by copying classified documents in violation of 18 U.S.C. 793(b), and by attempting to deliver such copies to an unauthorized person in violation of 18 U.S.C. 793(d). The district court preliminarily enjoined the Air Force from (1) trying DeChamplain on any charges based upon Article 134, and (2) trying him on any charges whatsoever, without granting full and unlimited access to all documents material to the case to "[DeChamplain], his civilian defense counsel and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial" (J.S. App. 30). This appeal followed.

The events preceding the present action relating to the espionage charges against DeChamplain, as developed in his first court-martial, are set forth in the opinion of the Air Force Court of Military Review

in *United States* v. *DeChamplain*, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.[1] In June 1971, while DeChamplain was stationed in Thailand, a Thai policeman observed him conversing on two occasions with an official of the Soviet Embassy in Bangkok. This information was relayed to the Air Force and following an investigation, DeChamplain was apprehended on July 2, 1971. At the time of his apprehension, he had in his possession twenty-four official documents, some of which were marked "Top Secret." 46 C.M.R. at 792.

DeChamplain was then taken to an Air Force facility outside Bangkok where he was advised of his rights, interrogated, and confined. 46 C.M.R. at 792–793. During the interrogation, DeChamplain remained silent, but he responded to questions by nodding and shaking his head. *Ibid.* Subsequently, on July 7, 8, 12, and 13, DeChamplain made eight separate statements regarding the alleged offenses. 46 C.M.R. at 795, n. 11.

DeChamplain pleaded not guilty and was tried by general court-martial on November 12, 1971, at Anderson Air Force Base in Guam. 46 C.M.R. at 896. Over his objection, the eight statements were admitted as evidence. 46 C.M.R. at 795, n. 11. DeChamplain was convicted of all charges and specifications and sentenced to a dishonorable discharge, confinement at

[1] This Court may take judicial notice of that opinion. See *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 157–158; 9 Wigmore, *Evidence*, § 2579 (3d ed., 1940). Of course, DeChamplain will have an opportunity at his second court-martial to argue that these facts have not been proved beyond reasonable doubt.

hard labor for fifteen years, forfeiture of all pay and allowances, and reduction to the lowest enlisted rank. 46 C.M.R. at 787.

This conviction was reversed by the Air Force Court of Military Review on October 5, 1972. *United States* v. *DeChamplain, supra.* In a 2–1 decision, that court concluded that DeChamplain's inculpatory statements should not have been admitted into evidence because an Air Force investigator had improperly continued to question DeChamplain after DeChamplain had communicated a desire to remain silent. 46 C.M.R. at 799–803. The case was remanded for a rehearing.

The Air Force Judge Advocate General sought review of this decision in the Court of Military Appeals pursuant to Article 67(b)(2), U.C.M.J., 10 U.S.C. 867 (b)(2). On February 16, 1973, that Court affirmed the decision of the Court of Military Review. *United States* v. *DeChamplain,* 22 U.S.C.M.A. 150, 46 C.M.R. 150.

Pursuant to the order of the military appellate courts, the Air Force then prepared to retry DeChamplain before a second general court-martial upon substantially the same charges. The charges were amended, however, by deleting all allegations pertaining to three of the classified documents that DeChamplain had previously been accused of attempting to deliver to the Russians (App. 20–28; J.S. App. 16, n. 1). As to these documents, the Air Force chose to forego prosecuting DeChamplain rather than to compromise the confidentiality of the

information (*ibid.*). In addition, the Air Force determined not to introduce twelve other classified documents, which had been admitted at the first court-martial, because of their connection with the confessions held invalid by the Court of Military Appeals. DeChamplain's two military counsel have been permitted to review the entire record of the former proceedings, but they are prohibited from discussing with the civilian defense team those classified portions to which the civilian team has not been granted access (J.S. App. 22, n. 7; App. 56–58).

The Air Force authorized DeChamplain, his military counsel, his chief civilian counsel, one civilian associate counsel, and one civilian secretary to have access to all nine remaining classified documents which it intends to introduce as evidence and upon which the charges are based. The following restrictions, however, have been imposed upon the use of the classified data (App. 27):

> (A) The documents may not be released to civilian counsel; (B) They may see and read the documents only in the presence of one holding the appropriate security clearance; (C) They may not make copies of the documents; (D) No witten notes made by them with respect to classified information contained in said documents may be removed from Air Force control; and (E) They will be advised of applicable laws and penalties for unauthorized release of classified info[rmation].

DeChamplain challenged these restrictions at a hearing conducted pursuant to Article 39, U.C.M.J.,

10 U.S.C. 839, preceding the second court-martial. The military judge sustained the restrictions (App. 62). The court's order also specified that the three-man civilian defense team would be granted access not only to the classified documents upon which the charges are based, but also to those portions of the prior court-martial record relating thereto, subject to the conditions applicable to the nine documents themselves (*ibid.*). DeChamplain also moved to dismiss the charges on various other grounds, including the asserted unconstitutionality of Article 134 (App. 56). The military trial court denied the motions to dismiss.

DeChamplain also filed three successive petitions for extraordinary relief in the Court of Military Appeals asserting a number of defenses, including a denial of access to relevant classified documents, the unconstitutionality of Article 134, and challenges to his pretrial confinement. All of these petitions were denied. *DeChamplain* v. *United States*, 22 U.S.C.M.A. 211, 46 C.M.R. 211, *DeChamplain* v. *United States*, 46 C.M.R. 1329; *DeChamplain* v. *McLucas*, 22 U.S.C.M.A. 462; 47 C.M.R. 552. In dismissing the second petition as "wholly unfounded," the Court of Military Appeals stated (46 C.M.R. at 1330):

> Invocation of the extraordinary powers of this Court granted by 28 U.S.C. 1651(a) is a last resort, not a first thought. It is apparent that counsel who submitted the first and second petitions under that Act are either unaware, or heedless, of that basic tenet.

Similarly, in denying the third petition, the Court emphasized that "[a] petition for extraordinary relief

is not a substitute for appeal." 22 U.S.C.M.A. at 462; 47 C.M.R. at 552.

DeChamplain's second general court-martial was scheduled to begin on November 15, 1973, at Richards-Gebaur Air Force Base, Missouri (J.S. App. 15). Since his arrest in July 1971 and throughout these proceedings, DeChamplain has been in military confinement (J.S. App. 23).

On October 3, 1973, DeChamplain brought this action in the District Court for the District of Columbia to enjoin his court-martial. The complaint (App. 6–18) alleged four causes of action: (1) the asserted unconstitutional vagueness of Article 134; (2) a claimed denial of due process and effective assistance of counsel because of the limitations on access to and use of classified documents; (3) an alleged denial of a public trial based upon the military trial court's ruling that persons who do not possess the necessary security clearance might be excluded from the courtroom during those portions of the court-martial when classified materials are introduced or discussed (see App. 66–67); and (4) an alleged denial of effective assistance of counsel by the Air Force's refusal to authorize DeChamplain's military counsel to represent him in collateral civilian judicial proceedings against the Air Force (see App. 32).

Asserting that he would be injured irreparably if the court-martial proceeded (App. 10, 13, 15, 16), DeChamplain also moved for a preliminary injunction (App. 34–35). The government then moved to dismiss the action for lack of subject-matter jurisdiction and

failure to state a claim upon which relief can be granted (App. 59).

Following the submission of briefs, affidavits, and exhibits and after hearing oral argument,[2] the district court issued the preliminary injunction (J.S. App. 29–30). The court first held that it could review the merits of DeChamplain's claims while his court martial is pending (J.S. App. 19–20). Next, the court held that DeChamplain could not be tried on the two charges under Article 134 because that Article is unconstitutionally vague (J.S. App. 20). Finally, the court ruled that the restrictions imposed upon access to and use of classified documents by DeChamplain's civilian counsel preclude a fair trial (J.S. App. 21–22).[3]

Upon these determinations, the district court preliminarily enjoined the Air Force from requiring DeChamplain "to submit to a court-martial which includes charges based upon Article 134" (J.S. App. 29–30). The injunction also prevents the prosecution of DeChamplain upon any charge unless "full and unlimited access to documents relevant and material to" the case is granted to DeChamplain, his civilian

[2] On November 8, 1973, one day prior to the hearing in the district court, DeChamplain moved to amend his motion for preliminary relief and raised a new issue regarding alleged interception of the oral and written communications of DeChamplain and his counsel (App. 73–74). The district court's opinion did not discuss this issue (J.S. App. 15–28).

[3] The district court did not decide the two other claims raised in the complaint concerning DeChamplain's representation by military counsel in civilian proceedings and possible exclusion of the public during portions of the second court-martial (see J.S. App. 17 n. 3, 22–23).

counsel, "and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial." (J.S. App. 30). Specifically, the court directed that the entire record of the first court-martial (including the text of the fifteen documents not involved in the second court-martial) be delivered to civilian counsel (*ibid.*).[4]

The government filed notices of appeal from this preliminary injunction to both this Court (J.S. App. 31) and the Court of Appeals for the District of Columbia Circuit (App. 75). On April 5, 1974, the court of appeals extended the time for docketing the record in that court to fifteen days after this Court's final decision in the present appeal.[5] On June 24, 1974, this Court postponed further consideration of the question of jurisdiction to the hearing on the merits (App. 78).

[4] Following the district court's decision, the Air Force authorized two consultants, who had been selected by DeChamplain's counsel (see App. 38), to have access to the same classified materials disclosed to his civilian counsel (J.S. App. 32–33). The same restrictions upon the use of these materials apply to the consultants.

[5] The court of appeals also declined to order DeChamplain released from pretrial confinement (App. 77). The Court of Military Appeals and the District Court for the District of Columbia have also refused to order DeChamplain released pending trial. *DeChamplain* v. *Lovelace*, Misc. No. 74–28 (U.S.C.M.A., April 17, 1974); *DeChamplain* v. *McLucas*, Civ. No. 1863–73 (D. D.C., May 6, 1974). In addition, DeChamplain contested his confinement in a petition for *habeas corpus* in the Western District of Missouri which was denied on September 26, 1974. *DeChamplain* v. *Lovelace*, Civ. No. 74CV169–3–W.

SUMMARY OF ARGUMENT

I

In view of the Court's order postponing consideration of jurisdiction, we first demonstrate that this Court has jurisdiction over the appeal pursuant to 28 U.S.C. 1252. That provision authorizes direct review of interlocutory orders of any court of the United States holding an Act of Congress unconstitutional in a civil action to which a government officer or employee is a party. DeChamplain contends that this Court lacks jurisdiction because the single-judge district court below was powerless to issue the injunction that he sought and received.

A three-judge court was not required to consider the threshold questions of whether civilian courts have jurisdiction over actions to enjoin pending court-martials and whether a complaint seeking such relief "formally alleges a basis for equitable relief." *Idlewild Bon Voyage Liquor Corp* v. *Epstein,* 370 U.S. 713, 715. As these threshold issues are dispositive in the present case, it follows that this Court can reverse the decision of the court below and direct that the complaint be dismissed.

Even the issue of the constitutionality of Article 134 does not require a three-judge district court. DeChamplain does not seek "to paralyze totally the operation of an entire regulatory scheme," *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 154, and he raises no substantial constitutional issue. The clause of Article 134 involved here merely assimilates federal crimes not separately specified in the Uniform Code of Military Justice and such assimilation of laws by reference is not unduly vague. *United States* v. *Sharpnack,* 355 U.S. 286, 293. Accordingly, no aspect of this case need be remanded for consideration by a three-judge court.

II

A civilian court may not enjoin a pending court-martial of a serviceman. Congress has provided in Article 76 of the U.C.M.J., 10 U.S.C. 876, that "all actions taken pursuant to those [court-martial] proceedings [by the military courts] are binding upon all * * * courts * * * of the United States * * *." The history of that provision discloses that Congress intended to limit civilian court review of court-martial proceedings to *habeas corpus* actions. By reviewing pretrial rulings of the military courts in this case, the district court violated the clear statutory scheme and legislative intent of the finality provision.

Younger v. *Harris,* 401 U.S. 37, holds that basic considerations of equity jurisprudence and the policy of federalism bar interference by a federal court with a state criminal prosecution save perhaps in cases of prosecution under a flagrantly unconstitutional statute or where there has been "official lawlessness" in the statute's enforcement. The same considerations apply to interference with military courts, augmented by the congressional decision that military court judgments should be unreviewable by the civilian courts, save by writ of *habeas corpus.* Constitution, Art. I, § 8; 10 U.S.C. 876; *Gusik* v. *Schilder,* 340 U.S. 128.

An application of these principles to the instant case plainly reveals that there was no basis for the district court's interference. Petitioner was charged

under a portion of Article 134 the constitutionality of which is not seriously challenged, and even the other portions of that Article have been upheld by this Court. *Parker* v. *Levy,* No. 73–206, decided June 19, 1974. Nor is there any contention or finding that the military court's restrictions on access to classified material even approaches "official lawlessness."

Finally, the grounds given by the district court for intervention are in error. Even if the issue here is one for which military courts have no special competence, that does not authorize district court intervention in the face of the many other policies opposing premature review. *Noyd* v. *Bond,* 395 U.S. 683, 693–698. The fact that the district court refused to release DeChamplain from confinement vitiates its argument that it could intervene because of the possibility of his incarceration pending trial and during appeal. In any event, the prospect of such confinement does not warrant interference with a pending prosecution. *Younger, supra,* 401 U.S. at 49.

III

Though lacking jurisdiction to hear DeChamplain's complaint, the district court reached the merits and decided both issues incorrectly. It held Article 134 of the Uniform Code of Military Justice void for vagueness although this case involves only the third clause of Article 134 ("crimes and offenses not capital") which, as a dissenting opinion in *Levy, supra,* recognized, is not subject to vagueness objections. That clause merely assimilates by reference statutes punishing noncapital federal offenses. The espionage charges

against DeChamplain are clearly within the statutory proscription.

The court below also erred in overturning the restrictions upon the disclosure of classified documents. No evidence is being withheld, and the conditions imposed upon the use of the classified materials are reasonable in light of the military's legitimate interest in preventing widespread dissemination of the materials. Moreover, the injunction entered is inconsistent with the court's opinion with respect to mandatory disclosure of fifteen classified documents which are part of the record of the first court-martial, but which are no longer part of the Air Force's case against DeChamplain. The Air Force correctly declined to release these fifteen documents to DeChamplain's civilian defense counsel and his civilian associates, secretaries, and consultants. In addition, the standard of review employed by the district court in reviewing the validity of the restrictions on classified documents conflicts with the standard set forth in *United States* v. *Augenblick,* 393 U.S. 348. Thus, the decision below is incorrect, not only as to the various jurisdictional and threshold issues outlined above, but also as to both substantive issues decided.

ARGUMENT

I. THIS COURT HAS JURISDICTION PURSUANT TO 28 U.S.C. 1252 BECAUSE THE COURT BELOW HELD AN ACT OF CONGRESS UNCONSTITUTIONAL IN A CIVIL ACTION TO WHICH OFFICERS OF THE UNITED STATES ARE PARTIES

The government has appealed to this Court under 28 U.S.C. 1252 (see J.S. App. 31), which provides for

direct review "from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action * * * to which * * * any officer or employee [of the United States] * * *, as such officer or employee, is a party." The present appeal fulfills all of these requirements. The district court, a court of the United States (28 U.S.C. 451), has entered an interlocutory order holding Article 134, U.C.M.J., 10 U.S.C. 934, an Act of Congress, unconstitutional in this civil action in which the Secretary of the Air Force and five Air Force officers are sued as defendants in their official capacities (App. 7–8).[6] Appellants are, therefore, properly before this Court.

Appellee DeChamplain attempts to avoid the jurisdiction of this Court, however, by contending in his motion to dismiss (pp. 5–8) that review of the merits may not be had on direct appeal here because the single-judge district court lacked jurisdiction since a three-judge court should have been convened.[7] Aside

[6] The Secretary of the Air Force (see 10 U.S.C. 8012) and commissioned officers of the armed forces serving on active duty (see *United States* v. *Carter*, 217 U.S. 286) are officers of the United States. Cf. *Reid* v. *Covert*, 351 U.S. 487, withdrawn on other grounds, 354 U.S. 1.

[7] DeChamplain's argument also rests upon the assertion that the district court's order may be reviewed by the court of appeals. As a precaution, we have filed a notice of appeal to the Court of Appeals for the District of Columbia Circuit (App. 75; see also, App. 76–77). But it is clear that the court of appeals is denied jurisdiction by 28 U.S.C. 1292(a)(1) because direct review may be had in this Court pursuant to 28 U.S.C. 1252. An appeal challenging the failure of the

from the peculiarity of appellee's attack upon a jurisdiction he successfully invoked, the point is without merit. No three-judge court was required in this case.[8]

The constitutional validity of Article 134 was properly addressed by the district court, although we believe the court's ultimate decision was plainly in error. By authorizing direct appeals from the judgment of "any court of the United States" holding an Act of Congress unconstitutional, 28 U.S.C. 1252, under which appellants seek review, assumes that single-judge district courts may in some cases decide the constitutionality of federal statutes. This case was a proper one for the exercise of that power. DeChamplain sought (App. 34–35) and obtained (J.S. App. 29–30) an injunction only against his own court-martial under Article 134. He did not seek "to paralyze totally the operation of an entire regulatory scheme * * * ." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154. Here, as in *Flemming* v. *Nestor*, 363 U.S. 603, the constitutionality of a federal statute has been drawn into question, but the suit does not "seek affirmatively

single-judge district court to convene a three-judge court would have to be lodged in the court of appeals but appellants make no such challenge and thus, even should this Court ultimately determine, contrary to our submission, that a three-judge court was required, our appeal is properly to this Court under 28 U.S.C. 1252.

[8] Should this Court decide, contrary to our submission, that a three-judge court was required, then, of course, the proper response, in an appeal otherwise properly laid under 28 U.S.C. 1252, would be to vacate the preliminary injunction and remand the case for consideration by a three-judge district court. See *Flemming* v. *Nestor*, 363 U.S. 603, 607; *Federal Housing Administration* v. *The Darlington*, 352 U.S. 977.

to interdict the operation of a statutory scheme," 363 U.S. at 607.[9] In these circumstances, a single-judge district court was empowered to make the constitutional determination envisaged by 28 U.S.C. 1252.

There is an additional reason why a three-judge court was not necessary. A second threshold question for the single-judge district court is "whether the constitutional question raised is substantial." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715. Here, the district court wrongly decided that it was, relying upon court of appeals decisions, subsequently reversed by this Court, holding the first two clauses of Article 134 unconstitutionally vague. The district court was clearly in error since the specifications in this case were laid under the third clause, an assimilative crimes statute, as to which there was and is no substantial constitutional question of undue vagueness. See *United States* v. *Sharpnack*, 355 U.S. 286, 293. Had there been any possibility that either or both of the first two clauses of Article 134 would come into play in the court-martial, there still would have been no substantial constitutional question that could be raised by DeChamplain since he was charged with espionage rather than unlawful speech and the statute was not vague as to his actions. To put the lid on the matter, even Article 134's application to speech under the first two clauses has since been settled by this Court's decisions in *Parker* v. *Levy*, No. 73–206, decided June 19, 1974, and *Secretary of the Navy* v. *Avrech*, No. 72–1713, decided July 8, 1974. The insubstantiality of the supposed constitutional question being apparent, the case cannot be remanded to a three-judge district court because such a court would lack the power to proceed. See *California Water Service Co.* v. *City of Redding*, 304 U.S. 252. For this reason as well, appellee's contention that the district court below lacked jurisdiction must fail.

[9] But compare *Kennedy* v. *Mendoza-Martinez*, *supra*, and *Flemming* v. *Nestor*, *supra*, with *Schneider* v. *Smith*, 390 U.S. 17, 22; see *Torres* v. *Connor*, 329 F. Supp. 1025 (N.D. Ga.).

There being no challenge to this Court's jurisdiction other than the fallacious contention that the district court lacked power to proceed, it is clear that appellants have properly brought this case up on direct appeal pursuant to 28 U.S.C. 1252.

II. THE DISTRICT COURT LACKED POWER TO INTERFERE WITH A PENDING COURT-MARTIAL

The district court in this case purported to exercise a jurisdiction it clearly did not possess. Appellee DeChamplain sought, and the court granted, extensive and unwarranted civilian court control of a pending court-martial prosecution. The court enjoined any prosecution of DeChamplain under Article 134 of the Uniform Code of Military Justice and assumed control over crucial aspects of the court-martial's pretrial discovery process. Such interference with the military justice system violates the law established by the rulings of this Court.

The integrity of the military justice system, like the criminal justice systems of the various states, is to be respected by federal courts. Intervention by an Article III court to divert or abort a prosecution in

one of those systems is justified only under unusual circumstances, such as a showing of bad faith or harassment, and when the party seeking relief is threatened with irreparable injury that is both great and immediate. None of the requisite elements has been shown, or even alleged, here. Consequently, the case should be reversed and the court-martial of appellee DeChamplain permitted to proceed.

The applicable principles are laid down by this Court's opinion in *Younger* v. *Harris*, 401 U.S. 37. After discussing that case, we will show that it is as applicable to interference with courts-martial as it is to interference with state criminal prosecutions and then show the inadequacy of the district court's reasons for intervention here.

1. In *Younger* v. *Harris*, *supra*, appellee Harris had been indicted and was being prosecuted by California for violation of its Criminal Syndicalism Act when he filed a complaint in the federal district court to enjoin the prosecution. He alleged that the prosecution, and even the presence of the Act, chilled his exercise of the rights of free speech and press. That complaint, claiming a chilling effect upon First Amendment rights due to a prosecution under a statute of highly dubious constitutionality, certainly presented a stronger case for federal court intervention than does DeChamplain's, whose prosecution is for acts of espionage, behavior that has no constitutional sanction. It is particularly significant, therefore, that this Court, in *Younger*, reversed a three-judge

district court, and held the interference with the state prosecution unjustified.

The *Younger* opinion pointed out that, with few exceptions, Congress has always "manifested a desire to permit state courts to try state cases free from interference by federal courts." 401 U.S. at 43. The "primary sources" of that policy are "the basic doctrine of equity jurisprudence that courts of equity should not act * * * to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief" (*id.* at 43–44) and the constitutional value expressed in federalism (*id.* at 44–45). Moreover, the intervention of federal courts to test statutes on their face, before application to concrete disputes, perhaps leaving the state without a valid law covering dangerous forms of behavior, was an inappropriate task for the judiciary, even where there was a "case or controversy" sufficient to satisfy Article III:

> The combination of the relative remoteness of the controversy, the impact on the legislative process of the relief sought, and above all the speculative and amorphous nature of the required line-by-line analysis of detailed statutes [citation omitted] ordinarily results in a kind of case that is wholly unsatisfactory for deciding constitutional questions, whichever way they might be decided. [401 U.S. at 53.]

The opinion therefore concluded:

> * * * [W]e hold that a federal court must not, save in exceptional and extremely limited

> circumstances, intervene by way of either injunction or declaration in an existing state criminal prosecution. Such circumstances exist only when there is a threat of irreparable injury "both great and immediate." A threat of this nature might be shown if the state criminal statute in question were patently and flagrantly unconstitutional on its face * * * or if there has been bad faith and harassment—official lawlessness—in a statute's enforcement * * *. [401 U.S. at 56; footnote, case citation, and internal cross-references omitted.]

Younger controls this case if the policy against intervention in state prosecutions applies to military prosecutions. It is clear that it does.

2. One need, perhaps, look no further than this Court's opinion in *Gusik* v. *Schilder,* 340 U.S. 128, to be satisfied that the long-standing policy against interference with pending prosecutions, most fully articulated subsequently in *Younger,* applies to the military justice system. The opinion of the unanimous Court, delivered by Mr. Justice Douglas, held that a district court should not sustain a writ of *habeas corpus* until the petitioner had exhausted his remedies within the military system, since civilian courts are required to respect the integrity of the military court system that Congress established (340 U.S. at 131–132):

> An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. * * * The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts. If an available procedure has not been employed to rectify the alleged error which the federal court is asked to correct, any interference by the federal court may be wholly needless. The procedure established to police the errors of the tribunal whose judgment is challenged may be adequate for the occasion. If it is, any friction between the federal court and the military or state tribunal is saved. * * * Such a principle of judicial administration is in no sense a suspension of the writ of habeas corpus. It is merely a deferment of resort to the writ until other corrective procedures are shown to be futile.

Gusik's analogy between the necessity for exhaustion of remedies in the state and military justice systems is supported by a comparison of *Younger* and the present case.

Here, as in *Younger,* it is clear that Congress has manifested its desire that Article III courts not interfere with another system of justice. That desire is clearly expressed in the finality provision of the Uniform Code of Military Justice. Article 76 of the Code, 10 U.S.C. 876, provides that "the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter * * * are final and conclusive" and "all action taken pursuant to those proceedings are binding upon all * * * courts * * * of the United States."[10] As argued in

[10] That Article provides in full:

"The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-

the government's Supplemental Brief in *Secretary of the Navy* v. *Avrech*, No. 72–1713, on which we rely here, the legislative history of Article 76 shows that Congress intended to limit civilian court review of court-martial proceedings to petitions for *habeas corpus*.[11] Thus, both the House and Senate committee reports state this purpose clearly:

> Subject only to a petition for a writ of habeas corpus in Federal Court, [Article 76] provides for the finality of court-martial proceedings and judgments.

S. Rep. No. 486, 81st Cong., 1st Sess. 32; H. Rep. No. 491, 81st Cong., 1st Sess. 35.

In permitting *habeas corpus* as the sole exception to the finality of actions within the military court system, Congress recognized the special constitutional status of that writ under the Suspension Clause.[12] There is, of course, no corresponding constitutional basis for the pre-court-martial injunctive action here.

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martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74) and the authority of the President."

[11] We are serving a copy of our Supplemental Brief in *Avrech* upon counsel for DeChamplain.

[12] "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." United States Constitution, Art. I, § 9, cl. 2.

The finality provision of Article 76 is appropriate in light of the comprehensive appellate procedures provided by the Uniform Code of Military Justice. See, *e.g.*, Articles 64–69, 10 U.S.C. 864–869. The ultimate responsibility for protecting the rights of accused servicemen (except for federal court review by writ of *habeas corpus*) has been placed in the Court of Military Appeals, a civilian judicial body with a specialized understanding of military problems. See *Noyd* v. *Bond*, 395 U.S. 683, 694. Subordinate to this court there are military appellate tribunals which insure that court-martial convictions of members of the Armed Forces will be thoroughly reviewed.

These provisions for appellate review show that Congress intended to create an extensive and independent judicial system for the administration of military justice. Federal court review was to be allowed only to the extent that the Constitution compelled the allowance of the writ of *habeas corpus* (see Supp. Brief in *Avrech*, pp. 7–9).

Since Congress intended to preclude civilian court review of court-martial convictions except in the limited situation where *habeas corpus* is available, *a fortiori* Congress intended to preclude review before a court-martial has even been completed.

Congress' policy was attributed by the *Younger* opinion to the basic doctrine of equity jurisprudence against restraint of criminal prosecutions and to the constitutional policy of federalism. The basic doctrine of equity jurisprudence is, of course, fully applicable here. The constitutional counterpart of federalism here is the power conferred upon Congress by Article

I, Section 8, clause 14 of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces," which includes the power to establish a special system of military courts. *O'Callahan* v. *Parker*, 395 U.S. 258, 261.

It follows, therefore, that the district court's interference with DeChamplain's court-martial could be justified only if there were a threat of irreparable injury both great and immediate such as prosecution under a statute "patently and flagrantly unconstitutional on its face" or if there were "bad faith and harassment—official lawlessness—in [the] statute's enforcement." *Younger* v. *Harris*, *supra*, 401 U.S. at 56. If this condition is not met, then DeChamplain must exhaust his remedies within the military justice system. *Gusik* v. *Schilder*, *supra*. If he is convicted and that conviction is sustained, he may then seek relief in the federal civilian courts by a writ of *habeas corpus*.

The question to be answered, then, is whether the district court's rationale for interfering with the court-martial meets the *Younger* standards. We will show that it clearly does not.

3. Article 134, under which most of the charges against DeChamplain are laid is not "patently and flagrantly unconstitutional on its face." As we show at pp. 33–34, *infra*, he is charged under the third clause of the Article, an assimilative crimes statute as to which there is no constitutional doubt. The other aspect of the district court's preliminary injunction addresses the details of counsel's access to classified documents. There is no claim of the facial invalidity

of any statute and there is no finding that the restrictions on access imposed by the military constitute "bad faith and harassment" amounting to "official lawlessness." It follows, therefore, that the requirements of *Younger* have not been met and that the district court lacked authority to interfere with DeChamplain's court-martial.

It may, nevertheless, be useful to examine the rationale for intervention advanced by the district court.

4. The district court rested its power to interfere with the court-martial on two erroneous interpretations of the law. The court believed, incorrectly, that the general rule requiring a serviceman to exhaust his military remedies before seeking relief in an Article III court rests entirely upon the superior competence of military tribunals with respect to issues peculiar to military life. Thus, the court reasoned, it could intervene here because the "issues are purely legal" (J.S. App. 20). Secondly, the court decided that DeChamplain would suffer irreparable injury if his court-martial were allowed to go forward since "in the event plaintiff is convicted and is sentenced to a period of confinement, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts" (J.S. App. 27–28). Neither of these premises for intervention withstands analysis.

a. The requirement that a defendant exhaust his remedies before petitioning an Article III court rests, in the case of military courts as well as state courts, not primarily on any presumption of differing com-

petences but upon congressional intent, doctrines of equity, constitutional values, considerations of appropriate judicial tasks, comity, the avoidance of friction and of duplication of effort. These factors are found in this Court's decisions in *Younger* v. *Harris, supra,* and *Gusik* v. *Schilder, supra,* and in *Noyd* v. *Bond,* 395 U.S. 683.

It is true, as the district court noted (J.S. App. 18–19), that *Noyd* v. *Bond* referred to the undesirability of this Court's interpreting "extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence, and which have not even been fully explored by the Court of Military Appeals itself." 395 U.S. at 696. But that observation, if it can be taken to refer to superior competence in the Court of Military Appeals rather than a preference that lower courts explore complex issues of law before this Court is called upon to decide them, is certainly not the core rationale of *Noyd* v. *Bond*. This Court's argument in *Noyd, supra,* 395 U.S. at 693–698, rests upon most of the same factors cited in *Younger* and *Gusik* and urged here. Nothing in the opinion supports the theory that district courts may intervene in courts-martial when their competence appears equal to that of the military courts on particular issues.

Any such doctrine of selective intervention would have a calamitous impact upon the integrity of the military justice system. Cases would be tried piecemeal, partly in the military courts and partly in the civilian courts. In this case itself, the district court did not enjoin any court-martial for DeChamplain. It

instead enjoined that part of the trial that was to proceed under Article 134 and left the other charges standing, subject to resolution of the access problem. Now part but not all of the case is proceeding through the civilian courts while the rest remains with the military.

The impropriety of the district court's intervention is even more clearly shown by its assumption of the authority to supervise the disclosure of classified documents prior to the court-martial. The preliminary injunction requires full and unlimited access to all documents "relevant and material" to the case by DeChamplain, his civilian counsel and "such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial" (J.S. App. 30). If that language means anything, it means the district court retains jurisdiction to determine, upon application of the plaintiff DeChamplain, (1) which documents are "relevant and material," (2) whether the terms of a protective order entered by the court-martial are "appropriate," and (3) whether disclosure to a particular associate or assistant is "necessary" for "adequate" trial preparation.

There could hardly be a more massive intrusion into a coordinate justice system than this. The district court has, in effect, taken from the military court the power to hear and to decide motions to dismiss charges and the power to supervise evidentiary disclosure.

Such an extraordinary intervention ought to be justified, as *Younger* v. *Harris* requires, by a showing of irreparable injury that is both "great and immediate." There is, however, no showing of any legally cognizable injury at all.

b. The proposition that DeChamplain, if convicted by court-martial, might serve all or a large part of his sentence before exhausting his military remedies, whatever its accuracy as a prediction, fails to state a legally cognizable injury. The non-intervention rule enunciated in *Younger* v. *Harris, supra,* and *Gusik* v. *Schilder, supra,* would be rendered meaningless if the prospect of confinement during appeal was an injury justifying federal court jurisdiction over state and military prosecutions.[13] As this Court said in *Younger, supra,* 401 U.S. at 49, the irreparable injury must be something more than "that incidental to every criminal proceeding brought lawfully and in good faith." Here nothing more was even alleged, much less shown.

5. Over and above the general principles barring the district court's jurisdiction, there is the additional barrier that there exists no specific authorization of jurisdiction for this case. The complaint cited 28

[13] The district court's conclusion that the prospect of confinement constitutes irreparable injury is difficult to reconcile with its refusal to release DeChamplain from confinement. Appellee has been confined pursuant to Article 10, U.C.M.J., 10 U.S.C. 810, since the date of his arrest (J.S. App. 23). The preliminary injunction did not affect his status, and subsequently, on May 6, 1974, the district court denied DeChamplain's motion for release pending appeal (App. 3). The court of appeals (App. 77) and the Court of Military Appeals, *DeChamplain* v. *Lovelace*, Misc. No. 74-28, decided April 17, 1974, have also refused to order DeChamplain's release pending trial.

U.S.C. 1331 and 1361 as granting jurisdiction. 28 U.S.C. 1331(a) requires that more than $10,000 be in controversy, which DeChamplain did not allege. This defect is fatal. See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 547; 1 Moore, *Federal Practice*, ¶ 0.92[1] (2d ed., 1974).

28 U.S.C. 1361 authorizes actions in the nature of mandamus. It did not enlarge the traditional scope of the mandamus power. See, *e.g., Leonhard* v. *Mitchell,* 473 F. 2d 709 (C.A. 2), certiorari denied, 412 U.S. 949; *Carter* v. *Seamans,* 411 F. 2d 767 (C.A. 5), certiorari denied, 397 U.S. 941. The present situation is not one of those "really extraordinary causes" for which mandamus is reserved. *Ex parte Fahey,* 332 U.S. 258, 260. "Mandamus, of course, may never be employed as a substitute for appeal * * *" (*Will* v. *United States,* 389 U.S. 90, 97), or be used to "thwart the congressional policy against piecemeal appeals" in criminal cases (*Parr* v. *United States,* 351 U.S. 513, 521). In addition, mandamus will not lie as the Air Force has not failed "to perform a duty owed to the plaintiff," as required for jurisdiction under 28 U.S.C. 1361. See *Spock* v. *David,* 469 F. 2d 1047, 1050 (C.A. 3).

It is clear, then, that, under the applicable law enunciated by this Court, the district court lacked the power to entertain DeChamplain's complaint.

III. THE DISTRICT COURT ERRONEOUSLY DECIDED THE SUBSTANTIVE QUESTIONS IN THIS CASE

Point II above demonstrated that the district court erred in assuming jurisdiction over this action. We

now show that, even if the merits of the dispute had been properly before the district court, its decision on both substantive issues is erroneous. For this reason, too, the injunction issued below is improper.

A. THE THIRD CLAUSE OF ARTICLE 134 IS NOT UNCONSTITUTIONALLY VAGUE

The district court enjoined DeChamplain's prosecution under any charges based upon Article 134 (J.S. App. 29–30) because it concluded that *Levy* v. *Parker*, 478 F. 2d 772 (C.A. 3), and *Avrech* v. *Secretary of the Navy*, 477 F. 2d 1237 (C.A.D.C.), established that Article 134 is unconstitutionally vague (J.S. App. 20–21). Had this rationale any validity, it would have been vitiated when this Court subsequently reversed the two decisions (*Parker* v. *Levy*, No. 73–206, June 19, 1974; *Secretary of the Navy* v. *Avrech*, No. 72–1713, July 8, 1974) and sustained the validity of Article 134.

But the district court's argument was fallacious in any event, since *Levy* and *Avrech* involved wholly different clauses of Article 134 from the one invoked against DeChamplain and there never has been any doubt of the constitutionality of the clause pertinent here. The Article prohibits (1) "all disorders and neglects to the prejudice of good order and discipline in the armed forces," (2) "all conduct of a nature to bring discredit upon the armed forces," and (3) "crimes and offenses not capital." The vagueness contentions in *Levy* (see slip op. 23) and *Avrech* (see slip op. 1) pertained only to the first and second clauses. As the Air Force Court of Military Review

held in reviewing DeChamplain's first conviction, he is being prosecuted only under the third clause of Article 134. *United States* v. *DeChamplain, supra*, 46 C.M.R. at 788. The dissenting members of this Court, who would have invalidated the first two clauses of Article 134, recognized that the third clause is an assimilative statute of a familiar type. (*Parker* v. *Levy, supra*, Stewart, J., dissenting, slip op. 1–2 n. 2):

> The clause in Art. 134 prohibiting "all crimes and offenses not capital" applies only to crimes and offenses proscribed by Congress. See Manual for Courts-Martial, United States ¶ 213(e) (1969). * * * Cf. *Grafton* v. *United States*, 206 U.S. 333. As such, this clause is simply assimilative, like 18 U.S.C. § 13 (1970), and is not the subject of the vagueness attack mounted by appellee on the balance of Art. 134. See generally Wiener, Are the General Military Articles Unconstitutionally Vague?, 54 A.B.A.J. 357, 358; Note, Taps for the Real Catch-22, 81 Yale L. J. 1518 n. 3.

As this statement indicates, the function of the third clause of Article 134—in contrast to the first two clauses—is merely to confer court-martial jurisdiction over service-connected noncapital federal offenses not otherwise individually specified in the Uniform Code of Military Justice. *United States* v. *Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37. Nor is the third clause unduly vague because these offenses are assimilated by reference rather than being set forth in full. In *United States* v. *Sharpnack*, 355 U.S. 286, 293, this Court sustained the Assimilative Crimes Act, 18 U.S.C. 13, holding: "Whether Congress sets forth

the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as the state laws themselves." DeChamplain has not contended that the incorporated statutes that he is accused of violating—18 U.S.C. 793(b) and (d) and 50 U.S.C. 783(b)—are unduly vague. Accordingly, under *Sharpnack*, his contention that the third clause of Article 134 is unconstitutionally vague is plainly wrong.[14]

B. THE RESTRICTIONS IMPOSED BY THE AIR FORCE UPON DISCLOSURE OF CLASSIFIED DOCUMENTS ARE VALID

The district court's preliminary injunction also rests upon its conclusion that the restrictions regarding access to and use of the classified materials in issue preclude a fair trial (J.S. App. 21–22). We argued above (pp. 27–31) that the district court erred in assuming jurisdiction to review this issue and that its decree, which envisions continuing supervision over the court-martial discovery proceedings, is an unwarranted interference with the military judicial system. We now show that the court below also erred on the merits in concluding that the restrictions preclude a fair trial.

[14] DeChamplain's motion to dismiss did not challenge any of these arguments. Instead, he contended that he is "in serious jeopardy of conviction pursuant to the first two clauses of that Article" (Motion to Dismiss, p. 5). As shown in our brief opposing that motion (pp. 2–3), that argument was factually incorrect, but in any event, it could not support the district court's injunction, which bars a court-martial under all three clauses of Article 134. Further, DeChamplain's argument is based upon the premise that the first two clauses are unconstitutional. The *Levy* and *Avrech* decisions thus dispose of the argument entirely.

No evidence is being withheld from DeChamplain or his civilian and military counsel. The restrictions regarding use of the classified materials are a reasonable accommodation of the accused's interests and the military's legitimate interest in preventing widespread dissemination of such sensitive materials.[15] In addition, after the district court's opinion was rendered, the Air Force amended its restrictions to enable a foreign-policy expert and an authority on military classification of documents selected by DeChamplain to have access to the classified materials (J.S. App. 32–33). This amendment obviates one of DeChamplain's principal challenges to the original restrictions (J.S. App. 17, n. 2).

Fifteen classified documents, however, have not been disclosed to DeChamplain's civilian defense team (J.S. App. 22). Although these documents were introduced as evidence at DeChamplain's first court-martial, the Air Force decided not to rely upon them in the second court-martial (see Statement, *supra*, pp. 6–7). DeChamplain and his two military counsel have had access to these materials, however, inasmuch

[15] The United States Court of Military Appeals has specifically recognized the conflict faced by the government in maintaining the prosecution of criminal offenses when disclosure of the substance of classified documents is essential to its case. In *United States* v. *Gagnon*, 21 U.S.C.M.A. 158, 44 C.M.R. 212, the court set out the options available to the government when faced with this dilemma in the following language: "* * * the officers concerned with operations must choose between (1) foregoing prosecution, (2) not using the classified information in any way, or (3) devising a system under which the information can be used at a trial." 21 U.S.C.M.A. at 165; 44 C.M.R. at 219.

as they are part of the record of the first trial (J.S. App. 22, n. 7; App. 56–58).

The district court's injunction requires that before DeChamplain is prosecuted on any charge whatever, the entire record of the first court-martial must be delivered to his civilian counsel (J.S. App. 30). There is no basis for the district court's requiring the confidentiality of the fifteen documents to be thus compromised when all charges involving those documents have been dropped and they will not be introduced as evidence. Although DeChamplain's chief military counsel represented generally that "a full and adequate understanding of the case and the possible theories of defense" required access to these fifteen documents as well as those on which the present charges are based (App. 56–57), he set forth no specific support for this conclusion, and none is readily apparent. Indeed, the district court's opinion states at one point, "The issue of access to documents, therefore, relates only to those upon which the Air Force is basing their case" (J.S. App. 16, n. 1). The injunction requiring delivery of the fifteen classified documents no longer a part of the case is thus unsupported and unwarranted.

Finally, the district court did not in any event, apply the proper standard of review. In *United States* v. *Augenblick*, 393 U.S. 348, this Court rejected the claim of a serviceman—who, unlike DeChamplain, had exhausted all military remedies—that his court-martial conviction was constitutionally defective because he had been denied access to potential evidence in the prosecutor's possession. *Augenblick* held that "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten * * * that the proceeding is more a spectacle * * * or trial by ordeal * * * than a disciplined contest." 393 U.S. at 356. By this standard, there is no basis for concluding that the restrictions imposed upon DeChamplain's use of the classified material would deny him a fair trial. Accordingly, the district court erred not only in exercising jurisdiction to review the restrictions upon disclosure of classified documents, but also in concluding that those restrictions are invalid.

CONCLUSION

For the foregoing reasons, the decision below should be reversed and the preliminary injunction should be vacated.

Respectfully submmitted.

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